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August 7, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
Portals II, Filing Counter TW-A325
445 12th Street, NW
Washington, DC 20554

Re: Docket No. MB 02-235
Transfer of Control of Broadcast Stations Licensed to Hispanic Broadcasting Corporation
File Nos. BTC, BRCFTB, BTCH-20020723 ABL-ADR and BTCH-20021125-ABD-ABH

Dear Ms. Dortch

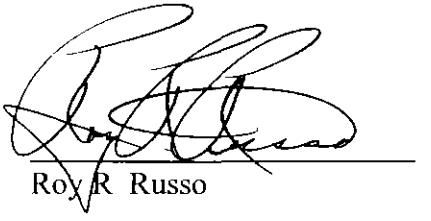
This letter is written on behalf of Hispanic Broadcasting Corporation ("HBC"), parent of the licensees of the broadcast stations which are the subject of the above-referenced pending transfer of control applications

As mentioned in Exhibit 9 to the licensees' portion of the foregoing applications, on June 12, 2002, Spanish Broadcasting System, Inc. ("SBS") filed a Complaint against HBC in the United States District Court for the Southern District of Florida (Case No. 02-21755) which alleged that HBC had engaged in anti-competitive actions in violation of various federal and state statutes

On February 3, 2003, we reported to the Commission that an Order was issued by the District Court granting Defendants' Motions to Dismiss the Plaintiff's federal claims, with prejudice. This is to inform the Commission that on August 6, 2003, the District Court entered an Order denying SBS's Corrected Motion for Reconsideration. A copy of the August 6, 2003 Order is supplied with this letter

Respectfully submitted

COHN AND MARKS LLP

By 
Roy R Russo

Counsel to Hispanic Broadcasting Corporation

Enclosure

cc Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J Martin
Commissioner Jonathan S Adelstein
David Brown, Esq (Media Bureau, FCC)
Barbara Kreisman, Esq. (Video Division, Media Bureau, FCC)
Scott R. Flick, Esq. (Counsel to Univision Communications Inc)
Arthur V Belendiuk, Esq. (Counsel to National Hispanic Policy Institute, Inc.)
Harry F Cole, Esq (Counsel to Elgin FM Limited Partnership)
Qualex International/Rm CY-B402

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-21755-SEITZ/BANDSTRA

SPANISH BROADCASTING SYSTEM, INC.

Plaintiff,

v.

CLEAR CHANNEL COMMUNICATIONS, INC. and
HISPANIC BROADCASTING CORPORATION.

Defendants.
_____/

ORDER DENYING PLAINTIFF'S CORRECTED MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court on Plaintiff's Corrected Motion for Reconsideration of the Court's Order Granting Defendants' Motions to Dismiss with Prejudice. [D.E. 61]. Upon review of the motion, the responses, and the reply, the Plaintiff's Motion is denied. Plaintiff does not: (1) present newly available evidence, (2) cite to any change in controlling law, or (3) demonstrate that the Court's January 31, 2003 Order Granting Defendants' Motions to Dismiss with Prejudice ("Order") was clearly erroneous or a manifest injustice.

Background

On June 12, 2002, Plaintiff Spanish Broadcasting System, Inc. ("SBS") sued Defendants Hispanic Broadcasting Corporation ("HBC") and Clear Channel Communications, Inc. ("CC") for alleged violations of Sections One ("Section One")[1] and Two ("Section Two")[2] of the Sherman Antitrust Act and state law. On July 31, 2002, SBS amended its Complaint. Defendants moved to dismiss arguing that SBS failed to state

[1] Section One prohibits, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." and penalizes "every person who shall make any contract or engage in any combination or conspiracy . . . declared to be illegal." 15 U.S.C. § 1 (West 2002).

[2] Section Two makes it a crime for any "person [to] monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the Several States . . ." 15 U.S.C. § 2 (West 2002).

a claim under the Sherman Act against either HBC or against CC because: (1) SBS has failed to allege harm to competition in general in the relevant market; and against CC specifically because (2) CC is a non-competitor in the relevant market and does not effectively control HBC. See Order at 5. Once the parties fully briefed the motions, the Court gave the parties one and one-half month advance notice of oral argument on the motions to dismiss. On January 9, 2003, the Court conducted a two-hour oral argument which gave the Plaintiff an opportunity to "flesh out" its Amended Complaint. See Order at 1, n.1. After careful consideration of the Amended Complaint, the parties' papers, and the oral argument, the Court dismissed SBS's Amended Complaint based on its: (1) failure to allege injury to competition in general; and (2) CC's non-competitor status in the relevant market. Id. at 5-6. The Court also noted that SBS alleged several internally inconsistent positions including: (1) despite Defendants' alleged predatory actions, SBS had "expanded rapidly"; (2) that while Defendants' actions against SBS harmed the consumer, the SBS and HBC merger of the two leading competitors in the relevant market did not harm competition; and (3) HBC and CC's actions might benefit relevant market consumers because "those actions will keep the price for the advertiser–the buyer in th[e] antitrust analysis–low." Id. at 19-20.

In its Motion for Reconsideration, SBS argues that the Court clearly erred by: (1) misconstruing the pleading standard for antitrust injury; (2) concluding that a non-competitor cannot be liable for a Sherman Act violation; (3) converting Defendants' Motions to Dismiss into Motions for Summary Judgment; (4) considering matters outside of the four corners of the Complaint; and (5) dismissing the case with prejudice.

Discussion

Courts will deny a motion for reconsideration unless there is (1) an intervening change in controlling law; (2) newly discovered evidence; or (3) the need to correct clear error or manifest injustice. Z.K. Marine, Inc., v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (it should *not* "be used as a vehicle to present authorities available at the time of the first decision or to *reiterate arguments previously made* . . .")

(emphasis added). "'Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.'" Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988) (citation omitted). Similarly, a motion for reconsideration is not an opportunity "to rethink what the Court already thought through–rightly or wrongly . . ." Z.K. Marine, 808 F. Supp. at 1563. SBS does not point to any newly discovered evidence or change in controlling case law.

I. Antitrust Pleading Standard

First, SBS argues that the Court held it to a heightened pleading requirement to show antitrust injury. To demonstrate that it had alleged injury to competition, SBS argues that its allegations were indistinguishable from those allegations found sufficient in Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, 754 (10th Cir. 1999). Pls' Mot. for Recons. at 6. SBS also reargues that Carribean Broadcasting System, Ltd. v. Cable & Wireless PLC supports its allegations. 148 F.3d 1080, 1086-87 (D.C. Cir. 1998). However, the Court considered and rejected Plaintiff's argument that Full Draw and Carribean Broadcasting applied to SBS's allegations. See Order at 12-13, n.19.

II. CC as Non-Competitor for Relevant Market

In its Amended Complaint, SBS alleged that CC, HBC, and SBS are all horizontal competitors for the relevant market for Section One purposes. Now, for the first time,[3] SBS raises the argument that CC is in a vertical relationship with HBC. Vertical combinations "are agreements, between firms occupying different levels in the chain of distribution of a *specific product*." Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1569 (11th Cir. 1991) (emphasis added). Under Plaintiff's new legal theory, Plaintiff does not, and cannot, allege that CC even distributes the same product in the relevant market as HBC and SBS. According to SBS, CC distributes advertising on English-language radio and HBC distributes advertising

[3] SBS has also filed a proposed Second Amended Complaint. In certain key aspects, there are facts in this proposed Second Amended Complaint which are diametrically opposed to the facts in the Amended Complaint. Such polar opposite factual pleadings gives the Court pause.

on Spanish-language radio. Therefore, SBS improperly raises the "vertical relationship" argument for the first time in its motion for reconsideration. Even considering the argument, SBS's argument fails because CC and HBC do not distribute the same specific product.

In addition, SBS argues that the Court erred when it concluded that non-competitors can *never* conspire to violate Section One. See Def's Mot. for Recons. at 8 (emphasis added). However, the Court made no such conclusion. As the opinion clearly states, as a mater of law, based on Plaintiff's allegations, the Court determined that a non-competitor cannot violate Section One when there is no vertical relationship or where the non-competitor does not join an ongoing conspiracy among competitors. See Order at 13-14 (emphasis added) ("[n]or, *under the facts Plaintiff alleges*, does CC further an already existing conspiracy between two competitors."). Therefore, CC could not conspire to violate Section One. Even SBS's proposed Second Amended Complaint does not allege an already existing conspiracy between two competitors.

CC is a non-competitor in the relevant market. Therefore, CC cannot attempt to monopolize the relevant market and cannot be held liable for HBC's actions unless SBS satisfies the state law standard for piercing the corporate veil. See Id. at 17-18 (explaining standard for piercing corporate veil). Notwithstanding this antitrust principle, SBS again requests to add a conspiracy to monopolize claim. The Court has previously rejected this request. Id. at 17-19 (discussing why SBS's Section Two claim was insufficient and amendment would be futile) citing Aquatherm v. Fla. Power & Light Co., 145 F.3d 1258, 1262 n.4 (11th Cir. 1998) ("[e]qually fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete.").

III. Conversion of Motions to Dismiss into Summary Judgment/ Considering Matters Outside of Four Corners of the Complaint/Dismissal with Prejudice

SBS also contends that the Court converted the motions to dismiss into summary judgment motions, considered matters outside of the four corners of the Complaint, and erred by dismissing SBS's Amended Complaint with prejudice. SBS's arguments are factually and legally without merit.

After several attempts to amend its Complaint,[4] an extensive oral hearing, and careful review of the proposed Second Amended Complaint, SBS cannot allege facts to survive dismissal. Therefore, it is hereby

ORDERED that Plaintiff's Corrected Motion for Reconsideration is DENIED.

ORDERED in Miami, Florida, this 6th day of August, 2003.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc:
Magistrate Judge Ted E. Bandstra
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[4] District courts are "not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." Wagner v. Daewoo Heavy Indust. Amer. Corp., 314 F.3d 541, 542 (11th Cir. 2002). The procedure in this case was in harmony with the interests in finality and efficiency announced in Wagner. Id.